SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 795

GLOBE INDEMNITY COMPANY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Globe Indemnity Company, a corporation, prays that a writ of certiorari to review the judgment of the Court of Claims of the United States in the above entitled cause be granted.

Jurisdiction

The judgment of the Court of Claims of the United States was entered May 1, 1944. A motion for a new trial was overruled on October 2, 1944 (R. 36). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement

Peter & A. J. Ellis, Inc., a corporation, entered into a contract with the respondent May 12, 1933 for the construction of the West Extension of the Steam Distribution System of the Central Heating Plant for Public Buildings in Washington, D. C., which system consisted of three distribution lines running in certain streets in the City of Washington, seventy-five (75%) percent of which was in close proximity to sewer, gas, water and electric mains, and either adjacent to or under paved streets and sidewalks. (Fdgs. 2 and 5.)

Except as to certain places where the drawings and specifications showed sheet steel piling was required, the drawings and specifications indicated that the soil conditions were such that the temporary planking timber sheeting and other supports were to be removed after the backfill had been placed. (Fdg. 7.)

In accordance with Articles 104 and 110 the contractor planned to use temporary planking, timbering and sheeting as the trench work progressed. (Fdg. 9.) After the work commenced it was discovered that the soil was soft flowing silt, and where this condition existed it was impossible to remove the temporary timber sheeting and shoring. (Fdg. 10.)

This condition was brought by the contractor to the attention of the government engineers, whereupon the contractor was told to complete the work and see how much lumber had to be left in place and then make up a proposal for the added cost thereof, which procedure was followed, and thereafter a written proposal in the sum of $19,565.00 was presented by the contractor for the timber sheeting left in place, which proposal was submitted by the construction engineer to the Supervising Architect of the Treasury Department recommending that it be accepted. (Fdg. 11.)

Thereafter, on January 2, 1934, a revised proposal in the sum of $19,439.25 was submitted by the contractor, which in turn was transmitted by the construction engineer to the Public Works Branch, Procurement Division of the Treasury Department, with a statement that it represented a fair and reasonable claim and that it be favorably considered. (Fdg. 13.)

On May 2, 1934 the Director of Procurement notified the contractor in part as follows:

> "A thorough review of the data in this case indicates that the extra you are claiming is not *legally* allowable and your proposal above described is therefore rejected. While the review of the case indicates, as stated above, that there is no tenable *legal* ground for the claim, if you still believe that it presents equitable considerations in your favor, *you have a right to present the claim direct to the Comptroller General.*" (Italics supplied.) (Fdg. 14.)

Thereafter the contractor submitted its claim for consideration to the General Accounting Office, and on February 27, 1936, L. A. Simon, as Assistant Director of Procurement, made a report to the General Accounting Office, in part, as follows:

> "In summary, it is concluded that there was no requirement in the contract which provided the methods to be followed under the unexpected conditions actually encountered. On the other hand, paragraph 110 of the specification specifically required that temporary sheeting be removed. A change in the requirements was plainly necessary if the temporary sheeting was to be left in the trenches.
>
> "Whether the change was one to be made under Article 3 or under Article 4 of the contract depends upon whether the nature of the soil to be expected was 'indicated' in paragraph 110 of the specification, since it is clear that the drawings contained no representations in that regard. It is believed that paragraph

110 did clearly indicate a form type of soil which would permit the removal of temporary sheeting. In fact, the direction to withdraw the temporary sheeting was more definite than a report on soil conditions; for if soil data alone had been furnished, each bidder would have been required to determine for himself whether removal of the sheeting would be possible. But if the nature of the soil was not 'indicated' within the meaning of Article 4, it nevertheless remains that a change in the contract requirements was necessary, and to effect the change resort to Article 3 of the contract would have been appropriate.

* * * * * * *

"Attention is invited to the fact that the claim states in several places that temporary sheeting was left in the trenches for the support of adjacent buildings. The Construction Engineer, now the Supervising Engineer, has stated that no temporary sheeting was in fact left in the trenches for this purpose, since adjacent buildings generally rested on piles and did not need support. Thus, the claim may be considered without reference to the possibility that the government was entitled to a credit for failure to install sheet steel piling at such points in accordance with paragraph 104 of the specification.

* * * * * * *

"The serious legal objection to the claim arises by reason of the fact that the contractor was not ordered to leave the temporary sheeting in the trenches under either Article 3 or Article 4 of the contract. It may be asserted, however, that an order would have been given had an attempt been made to remove it, and the contractor's procedure was the only feasible solution of an unavoidable problem. The Construction Engineer was fully cognizant of such procedure, as was this office, and there was no intimation during the time when the work was being performed that payment would not be made in accordance with the proposals under consideration. The work was necessary, and the proposal of

July 17, 1933, slightly revised, would have been accepted in advance of the work but for doubts then entertained as to the scope of the contract requirement. The government has received the full value of the sheeting left in the trenches, and, since the claim has been carefully checked and is believed to be reasonable in amount, it is recommended for such equitable consideration as the Comptroller General may give it."

Thereafter the General Accounting Office denied the contractor's claim. (Fdg. 17.)

The petitioner, as surety upon the contractor's bond, given to secure the performance of the contract, was compelled to accept liability and pay creditors, resulting in a net loss to the petitioner of $19,204.56, and petitioner, by virtue of its rights of subrogation, brought suit in the Court of Claims for the amount claimed to be due the contractor for the extra work. The Court entered judgment for the respondent.

Three Judges of the Court, including Chief Justice Booth (retired), held that under Article 3 of the contract, which provides that no change involving an estimated increase or decrease of more than $500.00 shall be ordered (by the contracting officer) unless approved in writing by the head of the Department, or his duly authorized representative and, no such written authority having been given by the head of the Department, petitioner was not entitled to recover (R. 34).

Two of the Judges, while disagreeing with the majority, held that as the contractor had not appealed to the head of the Department, in accordance with Article 15 of the contract, the plaintiff was not entitled to recover (R. 36).

Questions Presented

1. Whether under Articles 3 and 4 of a standard form Government contract, which provide for changes and

changed conditions, a contractor is precluded from recovering for extra work of the value of more than $500.00, because it had not been approved in writing by the head of the department.

2. Whether under Article 15 of a standard form Government contract, which provides for the settlement of disputes and appeal to the head of the department, a contractor is precluded from recovering for extra work, unless he appealed to the head of the department, where the rejection of the claim is based on legal grounds and the contractor is referred direct to the Comptroller General.

Contract and Specification Provisions Involved

The contract and specification provisions involved are set forth in the Appendix, *infra*, pp. 32-33.

Reasons for Granting the Writ

1. The Court of Claims has decided an important question of law relative to the construction of a standard form of Government contract which, if followed, will preclude recovery in practically every contract case where the amount involved is in excess of five hundred dollars.

2. The decision of the Court of Claims is really an evenly divided decision between the actual members of that Court and in conflict and inconsistent with its own decision in the case of *Armstrong* v. *United States*, 98 Ct. Cls. 519 (1943), therefore establishing great confusion, and the question should be authoritatively settled by this Court.

3. The decision of the Court of Claims fails to recognize the right of a contractor to recover upon a Quantum Meruit, which right has long been recognized by this Court.

4. The minority opinion is contrary to long established decisions of the Court of Claims that the right of the con-

tracting officer to decide questions of fact, does not include questions of law and, further, is in conflict and inconsistent with its decisions in *Rust Engineering Co.* v. *United States*, 86 Ct. Cls. 461 and *Thomas Earle & Sons, Inc.* v. *United States*, 100 Ct. Cls. 494, and should be authoritatively settled by this Court.

Prayer for Writ

Wherefore, the premises considered, your petitioner respectfully prays for the allowance of a Writ of Certiorari to the Court of Claims of the United States in this cause in order that it may be reviewed and redetermined by this Honorable Court.

Respectfully submitted,

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 795

GLOBE INDEMNITY COMPANY, A CORPORATION,
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THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below

The opinions of the Court of Claims of the United States, found in the record at pp. 31 and 35, are not yet officially reported.

Statement

A statement of the case has been set forth in the Petition for Writ of Certiorari and, in the interest of brevity, the statement is not repeated at this point.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that a contractor cannot recover for extra work, of the value of more than five hundred dollars, unless

the extra work has been approved in writing by the head of the department.

2. In holding that the petitioner could not recover for extra work because the contractor did not appeal to the head of the department from the decision of the contracting officer.

Argument

1

THE COURT OF CLAIMS ERRED IN HOLDING THAT A CONTRACTOR CANNOT RECOVER FOR EXTRA WORK, OF THE VALUE OF MORE THAN FIVE HUNDRED DOLLARS, UNLESS THE EXTRA WORK HAS BEEN APPROVED IN WRITING BY THE HEAD OF THE DEPARTMENT.

A

It can hardly be questioned that in most of the suits filed against the United States in the Court of Claims, involving contracts, there is a dispute between the contractor and the United States as to whether or not the contractor is entitled to extra compensation for work performed outside the contract requirements. It is unnecessary to point out that the head of the department is certainly not going to give written approval for extra work when he is taking the position that the work is not extra and is covered by the contract. To hold that a contractor cannot recover for extra work of the value of more than five hundred dollars, unless the extra work is approved in writing by the head of the department, notwithstanding the work was necessary, has been performed, and the Government obtained the benefit thereof, would preclude recovery in practically every contract case where there is a dispute between the contractor and the head of the department.

The Court of Claims has on numerous occasions given judgment for a contractor for amounts in excess of five

hundred dollars, where the work was not approved in writing by the head of the department. The following are but a few examples:

In the case of *Sollett & Sons Co.* v. *United States*, 80 Ct. Cls. 798, a dispute arose concerning the kind of title to be installed. Upon the insistence of the contracting officer the contractor installed glazed tile at an additional cost of many thousands of dollars. The Court of Claims decided that the contracting officer was in error and that the contractor was entitled to be paid the additional cost of installing glazed tile and, in the course of its opinion, stated in part as follows:

> "The defense is made that no change order was demanded by or issued to the contractor as required by the terms of the contract when changes were made. The inconsistency of this defense is apparent. The contracting officer and his superiors rule the contract provided for the glazed tiles. The contractor was ordered to furnish and erect the glazed tiles under the terms of the contract. A futile act is not required by the contractor. The plaintiff consistently has preserved his rights. The requirement by the defendant for glazed tiles was outside the terms of the contract. The plaintiff is entitled to recover the additional cost to it of furnishing and erecting the glazed tiles instead of the vitrified tiles."

It will be seen from the foregoing case that even though there was no written order the Court gave judgment for the contractor.

In the case of *United States* v. *McShain*, 308 U. S. 512, which was a *per curiam* decision reversing part of the decision of the Court of Claims (88 Ct. Cls. 284), an examination of the decision of the Court of Claims discloses the contract involved was with the Treasury Department, as was the contract in the instant case, and was for clearing

the site and construction of foundations for the Annex to the Internal Revenue Building, in this city.

While the suit contained several claims the only one having any relation to the instant case was an extra of $1350.00 for removing concrete.

The contract contained articles the same as articles 3 and 4 in the instant case, which provided that no change involving an increase in excess of $500.00 shall be ordered unless approved in writing by the head of the department, and that the contracting officer may, with the written approval of the head of the department, make changes in the drawings and specifications.

The contract also provided that the contractor should fully inform itself as to the location of site and conditions under which the work was to be done, and also examine the premises and inform itself of its character and type of structures to be removed. The contractor made an examination of the site and found it consisted in part of an automobile parking lot covered with cinders. There was nothing to indicate that a building had once occupied the site, nor that beneath the cinders the Contractor would encounter a concrete foundation. When the excavation reached the vacant lot it was discovered for the first time that there was a concrete foundation beneath the cinders. The contracting officer ordered the contractor to remove the concrete and approved $1,350.00 as the additional cost thereof, but the General Accounting Office ruled that the Government was not liable for the increased cost and refused to pay the claim.

There is nothing in the record to show that the head of the department ever approved in writing (or otherwise) the increased cost as required by article 3, and we have been informed by counsel for the plaintiff that he did not do so. Notwithstanding this complete failure to comply

with the provisions of articles 3 and 4, the Court of Claims gave judgment for an amount in excess of five hundred dollars and this Court did not reverse that part of the Court of Claims decision.

In the case of *Griffiths* v. *United States,* 77 Ct. Cls. 542, the Court of Claims permitted a recovery for extra work for which there had not been a written order by the contracting officer, although the contract provided that no charge for extra work or material would be allowed unless the same had been ordered in writing by the contracting officer and the price stated in such order.

In the case of *Ruff* v. *United States,* 96 Ct. Cls. 148, which involved a contract to construct a Post Office Building at Reading, Penna., one of the contractor's claims was for extra work in the sum of $3,326.62 for rock excavation. The Government furnished a drawing which showed a test pit and the nature of the samples therefrom. The samples did not show any rock. The contractor encountered rock in excavating for the footings and notified the Procurement Division and asked for additional compensation for the cost of the rock excavating, which was refused. The contractor appealed to the Secretary of the Treasury, and the Administrator of Federal Works denied the appeal. The Court of Claims permitted recovery under Article 4 of the contract, although the work had not been approved in writing by the head of the department, and stated in part as follows:

> "We think, therefore, that the subsurface condition was an unforeseen one, within the meaning of Article 4 of the contract, and that plaintiff was entitled to an adjustment of price and, not having received it, he is here entitled to compensation for the unexpected work. If this situation is not within the contemplation of Article 4, the alternative is that bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered. Such

a practice would be very costly to the defendant. We suppose that the whole purpose of inserting Article 4 in the defendant's contracts was to induce bidders not to do that."

With reference to Article 15, the Court said:

"As to the third item of dispute, that about the rock unexpectedly encountered in the course of excavation, the real question is whether, in view of the information furnished plaintiff by the defendant with reference to soil conditions on the site and in the neighborhood, the rock was an unanticipated subsurface or latent condition within the meaning of Article 4 of the contract. As to that, there is no evidence that anyone who took part in the negotiation of the contract, either on the side of the defendant or plaintiff, anticipated the condition that was actually encountered. That being so, the decisions of the defendant's officials were lacking any substantial support in the evidence. If the case were being tried by a jury, and the evidence stood as it does here, the Court would direct a verdict. We do not believe the plaintiff, in agreeing to Article 4 of the contract, intended to submit his rights under the contract to the hazard of a decision, not having any substantial evidence to support it. We think, therefore, that Article 15 does not prevent us from deciding this question also on its merits."

In the instant case the report of Mr. Simon states:

"Whether the change was one to be made under Article 3 or under Article 4 of the contract depends upon whether the nature of the soil to be expected was 'indicated' in paragraph 110 of the specifications, since it is clear that the drawings contained no representations in that regard. It is believed that paragraph 110 did clearly indicate a form of type of soil which would permit the removal of temporary sheeting. In fact, the direction to withdraw the temporary sheet-

ing was more definite than a report on soil conditions; for if soil data alone had been furnished, each bidder would have been required to determine for himself whether removal of sheeting would be possible. But if the nature of the soil was not 'indicated' within the meaning of Article 4, it nevertheless remains that a change in the contract requirements was necessary, and to effect the change resort to Article 3 of the contract would have been appropriate."

In the instant case we have a situation almost identical with that in the *Ruff* case as to unforseen subsurface conditions, the only real difference being that in the *Ruff* case the Government officials, having charge of the contract, were taking the position that the data furnished the contractor pointed to the probability of rock, while in the instant case the Government officials having charge of the contract take the opposite position. On the decision of the *Ruff* case alone the Court of Claims should have given judgment for the petitioner.

There have been many other cases where the Court of Claims has allowed a recovery for extra work, although the request therefor was oral, nothwithstanding the fact that the contract provided the order must be in writing, and in some instances by the head of the department, among which are the following, which we shall discuss more in detail hereafter.

Davis v. *United States*, 82 Ct. Cls., 334.
Rust Engineering Co. v. *United States*, 86 Ct. Cls. 461.
Armstrong & Co. v. *United States*, 98 Ct. Cls. 519.

B

Article 3 Not Applicable

Article 3 provides in part as follows: "No change involving an *estimated* increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in

writing by the head of the department or his duly authorized representative" (Italics supplied). It is clear that said article contemplates a situation where it is possible to estimate in advance of the work the cost thereof. In the present case it was not possible to estimate in advance the cost of work. The contractor was told to complete the work and see how much lumber had to be left in place and then make up a proposal for the added cost of the same (Fdg. 11, R. 22).

C

Evenly Divided Decision

This case was originally argued on January 5, 1944 before Chief Justice Whaley and Associate Justices Whitaker, Littleton and Madden (R. 17); Associate Justice Jones being on leave of absence as Food Administrator. It was quite apparent during the argument that there was a decided difference of opinion between Chief Justice Whaley and Justice Whitaker on the one hand and Justices Littleton and Madden on the other hand, and this is confirmed by the fact that the Court, on March 22, 1944, remanded the case for re-argument on April 3, 1944 R. 17). The case was re-argued on April 5, 1944 (R. 17), at which time Chief Justice Booth (retired) sat in the place of Justice Jones (R. 17). As shown by the opinions (R. 31, 35) the Court was divided on the question as to whether or not the contractor was precluded from recovering because the work had not been approved in writing by the head of the department, Chief Justice Booth (retired) concurring with Chief Justice Whaley and Justice Whitaker (R. 35).

In a previous case, *Armstrong & Co.* v. *United States*, 98 Ct. Cls. 519 (1943), involving practically the same question, the Court of Claims was similarly divided, except that Associate Justice Jones participated in the case and concurred

with Justices Littleton and Madden, and judgment was rendered for the contractor. In the *Armstrong* case the contract provided that the contractor should use certain common brick to be furnished by the United States. The Constructing Quartermaster decided to use the common brick for another job and required the contractor to use other brick, which resulted in an increased cost to the contractor. Upon completion of the job the contractor submitted a claim for the cost of the additional labor and material, which was rejected. The government resisted the claim upon the ground that there had been no written order for the change. The Court of Claims, in deciding in favor of the contarctor, stated in part as follows:

> "Our question is, however, not what would have been correct practice when the extras were ordered, but what to do with a case in which the responsible representative of the Government has not done nor has the contractor insisted upon his doing what the contract enjoined him to do at that time; a case in which, moreover, the contractor has, pursuant to an oral rather than a written order, performed just what the Government wanted to be done, and the Government has taken the product of that performance but refuses to pay for it. If we say that the position of the Government is legally correct, we thereby refuse to remedy a grave injustice because of the omission of a formality, because the words of the contracting officer were spoken and not written and did not say what was then impossible to say."

* * * * * * *

> "There is not a word in the record to show that the order of the Constructing Quartermaster, by which he saved some hundreds of thousands of bricks of good quality and diverted them to a more economical use for the Government, was in fact given without consultation with and sanction of his superior officers in the depart-

ment. There is no evidence that the department was not pleased at and benefited by the result accomplished by the order. There is no evidence that the Constructing Quartermaster was disciplined or even reprimanded for having, in violation of the mandate of the defendant's standard contract, ordered this extra work, the consequence of which was, unless we give relief, to cheat this plaintiff out of a large amount of money, and involve the department in an act of repudiation which, if done by anyone other than a government, would be regarded as dishonorable, even if legally permissible.

"What we have said leads us to this conclusion: when the contracting officer orally directed plaintiff to use the steel plant bricks, and promised it that an adjustment would be made when the work was completed and the fair amount determined, and when that direction was performed by plaintiff by doing the work and using the required material, a contract to pay plaintiff the reasonable cost of the work resulted."

Thus we have a situation where, when this question again comes before the Court of Claims, the decision will depend upon whether Justice Jones has returned and, if not, upon the opinion of whatever Justice sits in his place. This, we believe, is a very important question, and in order to avoid confusion this Court should grant the petition for writ of certiorari.

D.

Plaintiff entitled to recover on Quantum Meruit.

The case of *Clark* v. *United States*, 95 U. S. 539, originated in the Court of Claims and was for the recovery of the value of a steamer and use thereof. An officer of the Army entered into an oral contract with claimant to rent his steamer for $150.00 a day and to run her on a trial trip and if lost on the trip the government to pay the estimated value thereof. The steamer was delivered to the Quartermaster Department and, while on the trial trip, was wrecked.

It was determined that the value of the steamer was $60,000. The Court of Claims denied recovery upon the grounds that the contract was not in writing as required by the Act of June 2, 1862. This Court, while agreeing with the Court of Claims that recovery could not be had for the value of the steamer, reversed the Court of Claims with respect to the rights of the claimant to recover for the use of the steamer while it was in the hands of the government agents and held that when a parole contract has been wholly or partially executed and performed on one side, the party performing will be entitled to recover the fair value of this property or services upon an implied contract for a *quantum meruit*, the Court saying:

> "Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parole contract."

Further, the Court said:

> "If objected that the petition contains no count upon an implied contract for quantum meruit, it may be answered that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived."

In the case of *W. B. Moses* v. *United States*, 61 Ct. Cls. 352, the plaintiff had furnished certain furniture to the Navy Department, but payment was refused by the Comptroller of the Treasury Department upon the grounds that there had been no compliance with Sec. 3744 R. S., requiring contracts to be in writing and not sufficient proof of value of the furniture. Prior to suit being filed a contract was

executed, but the Comptroller refused to reopen the case. At the trial the defense was made that the officer who issued the requisition had no authority to do so. The Court of Claims allowed a recovery and stated:

> "The deficiency as to the contract in writing was supplied, but if that had not been done, or if it was done too late to be effective for any purpose, the fact remains that the goods were supplied upon a written order accepting a bid made by plaintiff, both of which instruments supplied the price, and *after performance of the contract*, it became immaterial whether there had or had not been a strict compliance with section 3744." (Italics supplied.)

The case of *Wilson & Gross* v. *United States*, 23 Ct. Cls. 77, involved a contract to do certain work in connection with the Pension Building in Judiciary Square, Washington, D. C. The claim was for extra work performed upon oral request and for work the contractor had been orally requested to perform, but which the government itself had performed. The Revised Statutes provided that the contract had to be in writing and signed by the parties. The Court of Claims permitted a recovery for the extra work actually performed, but denied recovery for that part which had not been performed, and stated:

> "The legal effect of the oral arrangement was that if the claimant should go on with the work they would become entitled to compensation upon an implied assumpsit, for the value of so much as they should actually perform, which, in the absence of other evidence would be the price fixed by the written contract for like work, (Clark v. United States, 95 U. S. R. 543) but did not operate to deprive the defendants of their right to do the whole or any part thereof themselves."

In the case of *Weller Construction Co.* v. *United States*, 61 Ct. Cls. 261, which involved a contract to do certain con-

struction work at Camp Knox, Ky., the contract contained the following provision: "No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement." One of the claims was for extra work of the value of $7,000.10, recovery for which was allowed by the Court of Claims, stating as follows:

> "The next item allowed is the sum of $7000.10 which the plaintiff expended for necessary extra work of which the defendant had the benefit. This work was done by the plaintiff upon the verbal order of the constructing quartermaster in charge of the work, but no written order was given. The work so done was necessary to the completion of the work. If it had not been done the work would have been left unfinished. Under the circumstances it does not seem to us that a written order was necessary in order that the plaintiff might be paid for it. The Government received the benefit of it and the plaintiff is entitled to recover on quantum meruit therefor."

The case of *Davis, et al.* v. *United States*, 82 Ct. Cls. 334, involved a contract to furnish certain electric machinery and equipment. The contracting officer took the position that the contractor had failed to furnish certain armored cable and other wiring shown on the plans, while the contractor insisted it was not required to furnish said material. Upon the insistence of the contracting officer the contractor furnished the material under protest. The contractor presented a claim which was denied. The Court of Claims held that the material being neither enumerated in the contract nor shown in the specifications was outside of and in excess of the plaintiff's contractual obligations. One of the defenses presented was that the plaintiff was precluded from recovery because Article 5 provided that no charge for extra work would be allowed unless the same

was ordered in writing by the contracting officer and the price stated. The Court of Claims, with respect to that defense, stated as follows:

> "It is true the price of the extra material furnished was not stated in the written order of the contracting officer, although they were specifically itemized and described in the order, for the manifest reason that the contracting officer under his construction of the contract did not regard them as extra requiring a change order within the meaning of Article 3 of the contract. The delivery of the additional material on the written order of the contracting officer in these circumstances did not come within the terms of Article 5 of the contract, and plaintiff's right to reimbursement therefor is not precluded by reason of the fact that the price of the material demanded was not stated in the order."

Further, the Court stated:

> "The defendant accepted the materials so furnished and received the benefit of them. In these circumstances an implied contract arose on the part of the United States to pay the plaintiff the cost of the extra material so furnished, $2,062.00. The implied contract to pay, however, is limited to the actual cost of the materials furnished and cannot be construed to include the additional ten percent claimed by the plaintiff."

The contract in this case also contained the provision that any extra in excess of $500.00 had to be approved in writing by the head of the department and from the decision we can assume this was not done, notwithstanding the Court permitted a recovery.

In the case of *Overly, et al.* v. *United States*, 87 Ct. Cls. 231, the Court of Claims allowed a recovery for extra work where the amount involved was in excess of $500.00, although it had not been approved in writing by the head of the department. The Court said:

> "Resoldering these joints was outside of the contract, extra work ordered by the contracting officer,

and performed by the contractor, and the government has received the benefit and should pay."

In the case of *Horton* v. *United States,* 57 Ct. Cls. 395, the plaintiff had submitted a bid to do certain work for the United States, but it had not been accepted and no contract was ever signed by either the plaintiff or the government. The project manager told the plaintiff to go ahead and not wait for formal acceptance. The claim was for the expenses the plaintiff went to in preparing to perform the contract and also for some work of dredging. The Court of Claims allowed a recovery for the work actually performed, holding that while the plaintiff could not recover for his costs of preparing to perform the contract, as it had not been signed as required by law, he could, nevertheless, recover for the work actually performed upon an implied contract for labor and material furnished for which the Government received benefit, and stated:

"The invalidity of a contract is immaterial after it has been performed or partially performed. When a lawful transfer of property is executed it does not matter whether the terms of the execution were void or valid while executory, and therefore cannot be revoked or the terms changed. A promise to make a gift does not bind, but the gift cannot be taken back and the transfer in pursuance of mutual promises is not made less effectual by those promises or by the fact that money was received in exchange."

The case of *Rust Engineering Co.* v. *United States,* 86 Ct. Cls., 461, we believe is very similar to the instant case. In that case the contractor encountered, early in the prosecution of the work, subsoil conditions materially different from those shown on the drawings or specifications. The contractor was told by the contracting officer to proceed with the work, but its claim for the extra work (which was in excess of $500.00 and had not been approved in writing by the head of the department), was rejected and the con-

tractor informed it might submit its claim to the General Accounting Office. The claim was denied by the General Accounting Office. The Court of Claims, in allowing recovery, stated in part as follows:

> "The changes made necessary by reason of the conditions encountered in excavating for the foundations of the building were not reasonable changes within the scope of the drawings and specifications as contemplated by Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. On the facts disclosed plaintiff is entitled to recover for this item. But its recovery must be limited to the actual costs incurred without profit."

. . In the instant case, early in the prosecution of the work subsoil conditions materially different from those indicated in the specifications were encountered and the contractor conferred with Government representatives and was told to complete the work and then make up a proposal of the added cost. The undisputed facts are that in preparing the plans and specifications for the work no consideration was given to the character of the soil to be encountered, that the extra work was necessary and the Government has received the full benefit thereof and the cost was reasonable. As in the *Rust* case, the claim was rejected by the Board of Awards on legal grounds and the contractor told it had the right to present the claim to the Comptroller General, which it did, and the Comptroller General rejected the claim upon legal grounds. In the *Rust* case the extra work was not approved in writing by the head of the department, yet the Court did not let that fact stand in the way of doing justice and paying the contractor for neces-

sary extra work performed, and we see no reason why the Court cannot do justice in the instant case and permit a similar recovery.

2

THE COURT OF CLAIMS ERRED IN HOLDING THAT THE PETITIONER COULD NOT RECOVER FOR EXTRA WORK BECAUSE THE CONTRACTOR DID NOT APPEAL TO THE HEAD OF THE DEPARTMENT FROM THE DECISION OF THE CONTRACTING OFFICER.

Article 15 provides in part as follows: "——all disputes concerning *questions of fact* arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department, whose decision shall be final and conclusive upon the parties thereto as to such *questions of fact.*" (Italics supplied.)

The Director of Procurement in his letter of May 2, 1934 rejecting the claim stated in part as follows:

> "A thorough review of the data in this case indicates that the extra you are claiming is not *legally allowable* and your proposal above described is therefore rejected." (Italics supplied.) (R. 26.)

There is nothing in the letter to indicate that the Director of Procurement was making a decision upon a question of fact but, on the contrary, it shows clearly that he was making a legal decision, which is supported by the report of the Procurement Division which states in part as follows:

> "Thereafter the claim was extensively reviewed, both from an engineering and legal standpoint, and preliminary steps were taken with a view to submitting the matter to the Comptroller General. So many doubts were involved from a *legal* standpoint however that it was ultimately decided that the claim should be rejected and the contractor advised that that claim might be filed with the Comptroller General, which pro-

> cedure would give the contractor an opportunity to argue its own case. The contractor was thus advised by letter of May 2, 1934 that the claim was not considered *legally* allowable and that it might be presented direct to the Comptroller General." (Italics supplied.)

The foregoing shows clearly that the contracting officer was not making a decision interpreting the drawings and specifications, but a legal decision and, therefore, not binding on the contractor. The Court of Claims has held on numerous occasions that it is the province of the Court to make decisions on questions of law. In the case of *Callahan Construction Co.* v. *U. S.*, 91 Ct. Cls. 538-616, the Court of Claims said in part:

> "In Davis, et al. v. U. S. 82 Ct. Cls. 334, this Court held that the competency of the parties to a government contract to stipulate that the decision of disputed questions by the contracting officer of the government, or by the head of the department on appeal, shall be final and conclusive is limited to *questions of fact* and, therefore, does not include questions involving the construction of the contract, which are questions of law." (Italics supplied.)

In *Penker Construction Co.* v. *U. S.*, 96 Ct. Cls., 1-36, the Court of Claims held that such provisions were not intended to give the contracting officer power to make final and conclusive decisions on questions of law.

At every stage of the proceedings the contractor did exactly as it was told to do. It was first told to carry on all business with Mr. Melick (R. 19, to whom it reported the condition of the soil (R. 22). It was told to leave the temporary timber sheeting in place (R. 22, which it did. It was told to wait until the work was complete and then submit a proposal (R. 22), which it did. It was requested to submit another proposal R. 24), which it did (R. 24), and then

when its claim was rejected it was informed that it had a right to present the claim *direct* to the Comptroller General (R. 27), which it did (R. 29).

The letter of May 2, 1934, rejecting the claim, stated in part as follows:

> "While the review of the case indicates, as stated above, that there is no tenable legal ground for the claim, if you believe that it presents equitable considerations in your favor *you have the right to present the claim direct to the Comptroller General.*" (Italics supplied.) (R. 26-27.)

That is what the contractor did, and now the respondent complains because he did the very thing it suggested the contractor do. In this connection the Court's attention is invited to the recent case of *Thomas Earle & Sons, Inc.* v. *U. S.*, 100 Ct. Cls. 494, decided January 3, 1944, wherein the plaintiff, a government contractor, was making claim for expenses during the fifteen day suspension of the work, and was advised by the contracting officer that he did not have jurisdiction and the claim should be submitted to the Comptroller General, whereupon the plaintiff did submit the claim to the Comptroller General, who denied it. In that case the government took the position that since the plaintiff had not appealed from the decision of the contracting officer, it was not entitled to recover. The Court of Claims, in denying that contention, stated in part as follows:

> "The Government urges that plaintiff's claim may not be considered because it failed to pursue its remedy under the contract in that it did not appeal from the decision of the contracting officer to the head of the department, within the 30 days specified in Article 15 of the contract or at any time. We disagree with this contention. The contracting officer's message of June 12, 1934, was not a decision on the merits of the plain-

> tiff's claim. It was a disclaimer of jurisdiction to decide it under the provisions of the contract, and an unqualified statement that jurisdiction to decide it was in another officer of the Government, wholly outside the Navy Department. If that advice was correct, the plaintiff has lost no rights here by following it. If it was not correct, the plaintiff still has lost no rights as a consequence of being misled by it. The advice was given by the Chief of the Bureau of Yards and Docks, the official in the Department who was held out to the public and the plaintiff as an official competent to bind the Government by committing it to important contracts, and making important decisions in regard to them. If one dealing with the Government could not even safely trust this official's direction as to where to go next in search of a decision upon his claim in relation to the very contract which this very officer had made with him, he would be hopelessly lost in the mazes of the Government's organization."

A careful study of the undisputed facts shows that the rejection of the contractor's claim in the letter of May 2, 1934 was not a decision on a question of fact as contemplated by Art. 15. The letter of May 2, 1934, written by Admiral Peoples, Director of Procurement, very definitely stated that a review of the case indicated there was no *legal* ground for the claim, and then went on to say that the contractor had the *right* to present the claim *direct* to the Comptroller General, if the contractor believed the claim presented any *equitable* considerations, and that is exactly what the contractor did, present the claim to the Comptroller General, who again rejected it upon legal grounds. The minority opinion states that while the rejection was put upon the cryptic grounds that the claim was "not legally allowable," the letter of February 27, 1936 seems to show the rejection was upon the ground that the contractor was doing no more than the contract required.

The part of the letter of February 27, 1936, to which the minority opinion refers, is probably the following:

> "The work was necessary, and the proposal of July 17, 1933, slightly revised, would have been accepted *in advance* of the work but for doubts *then* entertained as to the scope of the contract requirement." (Italics supplied.) (R. 30.)

A review of the sequence of events shows that the extra work was started in July, 1933, and had been completed by January 1934. The letter of rejection was written in May, 1934. It will be noted that the report of February 27, 1936 does not state that the claim was rejected because of any doubts as to the contract requirements, but that the revised proposal "would have been accepted in *advance* of the work but for doubts *then* entertained as to the scope of the contract requirement." (Italics supplied.) Not doubts that existed on May 2, 1934, but doubts that existed back in July, 1933. On the contrary the rejection of May 2, 1934 clearly shows that it was not a decision on a dispute of fact, as if such had been the case there would have been no occasion for the letter, after definitely stating there was no legal ground for the claim, to then go on to say "if you still believe that it presents *equitable considerations* in your favor you have the *right* to present the claim *direct* to the Comptroller General." (Italics supplied.) (R. 27.)

Reference is again made to the case of *Rust Engineering Co.* v. *United States, supra,* where this same question was involved. The contractor's claim was rejected by the Board and it was advised it might submit the claim to the General Accounting Office if it so desired. Defense was made that the contractor, having failed to appeal to the head of the

department, was barred from recovering. The Court of Claims stated as follows:

> "Appeals were necessary under the contract only on disputes concerning questions of fact, and there was no controversy as to the facts. The board, even if its action could be considered as a decision of the contracting officer, made no finding of fact. *There was, therefore, nothing from which an appeal was required to be taken.*" (Italics supplied.)

In the instant case the rejection of May 2, 1934 did not make any finding of fact from which an appeal could have been taken. On the contrary it stated there was no legal ground for the claim, and told the contractor he had the right to present the claim direct to the Comptroller General.

But there is still another part of Mr. Simon's report which we believe shows conclusively that the letter of May 2, 1934 rejecting the claim was not upon the grounds of any doubts as to the contract requirements, as he states:

> "Thereafter the claim was extensively reviewed, both from an engineering and legal standpoint, and preliminary steps were taken with a view to submitting the matter to the Comptroller General. So many doubts were involved from a *legal* standpoint however that it was ultimately decided that the claim should be rejected and the contractor advised that the claim might be filed with the Comptroller General, which procedure would give the contractor an opportunity to argue its own case. The contractor was thus advised by letter of May 2, 1934 that the claim was not considered *legally* allowable and that it might be presented direct to the Comptroller General." (Italics supplied.)

From the foregoing it will be seen that while the claim was reviewed from both an engineering and legal standpoint, the only doubts which existed at the time the letter

of May 2, 1934 was written, rejecting the claim, were "from a legal standpoint."

Conclusion

For the reasons stated and on the authorities cited we submit that the writ of certiorari should be granted and that judgment should be reversed.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX

Contract Provisions

Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Specification Provision

"110. PLACING.—Earth backfill shall be placed in horizontal layers, not over eight inches in depth, each thoroughly tamped, packed, or puddled, as directed, so that no settlement shall occur. All temporary planking, timbering, sheeting, and other supports shall be removed as the backfill is placed. Great care shall be exercised during the backfilling to avoid disturbance or damage to any concrete or other work."

No. 785

In the Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE [illegible] CORPORATION,

Petitioner,

vs.

[illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

BRIEF

INDEX

CITATIONS

631366—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 795

GLOBE INDEMNITY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Claims (R. 31–36) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1944 (R. 36). Petitioner's motion for a new trial was overruled on October 2, 1944 (R. 37). The petition for a writ of certiorari was filed on December 29, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether recovery may be had under a Government construction contract for "additional" work performed, where (1) the contractor failed to appeal to the head of the department, as required by the contract, from a ruling of the contracting officer that such work was required under the contract, and (2) no attempt was made to secure written approval by the head of the department, as required by the contract, of changes in the specifications.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, pp. 12–15.

STATEMENT

Petitioner was the surety on the performance and payment bond of Peter and A. J. Ellis, Inc. (herein called the contractor), which entered into a contract with the United States on May 12, 1933, to construct part of the steam distribution system of the central heating plant that services public buildings in Washington, D. C. (Fdgs. 2, 3; R. 18). This work involved the construction of three pipe lines between 18th and C Sts., N. W., 19th and C Sts., N. W., the Interior, State, War, Munitions, and Navy Buildings, and the Naval Hospital (Fdgs. 2, 5; R. 18–20). Three-fourths of the construction work, which for the most part consisted of open trench work, was to be done in

close proximity to sewers, and gas, water, and electric mains, and adjacent to, or under, paved streets and sidewalks (Fdg. 5; R. 20).

As the trenches were dug it was necessary to shore up their sides with supports. The contract indicated that subsidence of adjacent soil was to be expected at certain points and that permanent sheet steel piling would be required in such areas (Fdg. 6; R. 20–21). Section 110 of the specifications provided, however, for the removal of all temporary piling and supports as the earth backfill was placed (Fdg. 6; R. 21). Before submitting its bid, the contractor visually examined the route the steam lines were to follow (Fdg. 8; R. 21). However, the contractor discovered, shortly after the work had begun, that at certain locations, the nature of the soil made it impossible to remove the temporary shoring without endangering adjacent structures (Fdg. 10; R. 21). When the contractor brought this to the attention of the government engineers in charge of the project, it was advised to leave the temporary shoring in place and to submit a written statement as to the additional cost (Fdgs. 4, 10, 11; R. 19, 21–22). This was done (Fdg. 11; R. 22) at an expense to the contractor of over $500 (Fdgs. 11, 12; R. 22–25). No written order covering this expenditure, however, was obtained from the contracting officer. Nor was the written approval of the head

of the department or his representative obtained (R. 27, 32–34).[1]

Thereafter, on July 17, 1933, the contractor submitted a proposal covering the increased cost of leaving the temporary sheeting in place, which was forwarded to the Supervising Architect (Fdg. 11; R. 22). In January 1934 the contractor submitted a revised proposal, which was rejected (Fdgs. 12–14; R. 24–26). The contractor was informed of the rejection on May 2, 1934, in a letter which stated that the claim was not legally allowable and referred the contractor to the Comptroller General (Fdg. 14; R. 26–27). No appeal was taken from this decision (Fdg. 14; R. 27).[2] The contractor completed the work and, on April

[1] Article 4 of the contract provides that if, during the progress of the work, the contracting officer finds that the subsurface conditions encountered differ materially from those indicated in the specifications or drawings, he shall, with the written approval of the head of the department or his representative, make such changes in the specifications as are necessary. Any increase in cost consequent thereon is to be adjusted as provided in Article 3. That article provides that any change involving more than $500 shall be approved in writing by the head of the department or his representative; that a claim for adjustment must be asserted within ten days from the date the change is ordered; and that any dispute is to be resolved as provided in Article 15. (See pp. 12–13, *infra*.)

[2] Article 15 of the contract provides that all disputes concerning questions of fact arising under the contract shall be decided by the contracting officer or his representative, subject to appeal to the head of the department, whose decision shall be final. (See pp. 13–14, *infra*.)

20, 1935, received final payment without protest (Fdg. 16; R. 29). No reservation was made on the final voucher as to the cost of leaving the timber sheeting in place (Fdg. 16, R. 29). A claim covering that cost was subsequently submitted by the contractor to the General Accounting Office, which denied it (Fdg. 17; R. 29–31).

The petitioner, as surety on the performance and payment bond of the contractor, having been compelled to pay the contractor's creditors a net amount of $19,204.56, brought suit in the Court of Claims to recover that amount (Fdg. 18; R. 31). The Court of Claims held (R. 31–35) that the additional work done was covered by Article 4 of the contract, dealing with changes in the plans and specifications where the subsurface conditions encountered differ from those indicated by the specifications, and that recovery was precluded by the contractor's failure to comply with Articles 3 and 4 of the contract, which require that where extra work is performed because of such changes, the written approval of the head of the department must be secured. Judges Madden and Littleton concurred on the ground that the contractor was foreclosed by its failure to appeal, as required by the contract, from the decision of the contracting officer that in leaving the timber sheeting in place no more was done than the contract required (R. 35–36).

ARGUMENT

We submit that the decision below was correct, on either of the grounds relied upon by the judges of the Court of Claims.

1. Under the express terms of the contract, the contractor's failure to appeal to the head of the department the determination of the contracting officer rejecting its claim for extra compensation for the wooden sheeting left in place forecloses recovery. *United States* v. *Blair,* 321 U. S. 730; *United States* v. *Callahan Walker Co.,* 317 U. S. 56; *United States* v. *John McShain,* 308 U. S. 512; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *Plumley* v. *United States,* 226 U. S. 545.

When the contractor discovered, after beginning work under the contract, that in some places it would be impossible to remove the timber supports without jeopardizing the stability of surrounding structures, the question arose as to whether the existing specifications should be changed pursuant to Article 4 of the contract. The letter of May 2, 1934, rejecting the contractor's claim for additional compensation for the wood sheeting left in place when the backfilling was laid, resolved this question against the contractor (Fdg. 14; R. 26–27, 33) on the ground, as the concurring judges below found, that the contractor, in leaving the timber sheeting in place, was doing no more than the contract required—back filling its trenches without damaging adjacent

structures—and was not entitled to an order changing the specifications because of unanticipated subsurface conditions (R. 36). The contractor did not appeal from this determination to the head of the department, as provided by Article 15 of the contract, but completed the work under the contract and accepted, without protest, the Government's check in payment of the balance due under the contract, making no reservation with respect to the extra cost of leaving the temporary timber sheeting in place (Fdgs. 14, 16; R. 27, 29). Not until three months after the acceptance of this check did the contractor renew its claim for additional compensation.

It is settled that the appeals provision in Article 15 of the contract constitutes "the only avenue for relief" (*United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61) available for the settlement of disputes concerning questions arising under Government contracts, and that unless such procedure is followed, no claim for damages may be asserted in the Court of Claims. As was stated in *United States* v. *Blair*, 321 U. S. 730, 735, "Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions," a contractor is "not free to disregard them without due cause." In the absence of a valid excuse for not appealing to the department head pursuant to Article 15, failure to exhaust this administrative

remedy bars recovery. *Bray* v. *United States*, 46 C. Cls. 132, 138–139; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 734; *Horace Williams Co.* v. *United States*, 85 C. Cls. 431, 441; *Silas Mason Co. Inc.* v. *United States*, 90 C. Cls. 266. And, in the absence of such appeal, the contracting officer's determination of fact, necessarily embraced in his conclusion that the claim was not allowable, that the specifications required leaving the shoring in place, is, under the terms of the contract, conclusive upon the contractor in the absence of fraud, bad faith, or such gross error as to imply bad faith, none of which is here claimed to exist. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Ripley* v. *United States*, 223 U. S. 695, 704; *Plumley* v. *United States*, 226 U. S. 545, 547; *United States* v. *Gleason*, 175 U. S. 588; *Kihlberg* v. *United States*, 97 U. S. 398, 400; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *McIntyre* v. *United States*, 44 C. Cls. 448, 452–453; *Lustbader Construction Co.* v. *United States*, 62 C. Cls. 549, 561; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266; *Myers* v. *United States*, 101 C. Cls. 41.

2. Even if the contractor's failure to take the appeal required by Article 15 would not bar the claim, petitioner was still properly denied recovery, because the wooden sheeting left in place

as a consequence of the oral advice given by subordinate government officials was not ordered "in the manner required by the contract." *Plumley* v. *United States*, 226 U. S. 545, 547. The machinery for adjusting the contract price set up in Article 3, and made applicable, by reference, to alterations in the contract required by unanticipated subsurface conditions, requires that changes in specifications must have the written approval of the head of the department or his representative. In this case, no written change was ever made in the specifications, or requested; nor was the written approval of the head of the department or of his representative obtained (Fdg. 14; R. 27).

The record is barren of any excuse for the contractor's failure to comply with the requirements of the contract in this respect.[3] The cases cited by petitioner (Pet. 11–15), in which recovery was allowed despite failure to secure the required approval, involved situations where it was either impossible or futile to secure a change order

[3] Petitioner's contention that such a change order could not have been issued, because it was impossible to estimate in advance the increase in the cost of the work (Pet. 15–16), is without merit. Two months after the contract was signed and almost two years before final payment was made on it, the contractor submitted an estimate of the cost of leaving the wood bracing in place which differed but slightly from the revised estimate, submitted 6 months later, upon which the present suit is based (Fdgs. 2, 11, 12, 16; R. 18, 22, 24–25, 29).

as required by the contract.[4] Although the contracting officer in this case eventually ruled that no change order was necessary because leaving the shoring in place was embraced within the terms of the contract, this decision was not made until almost a year after the contractor first concluded that the subsurface conditions encountered differed from those anticipated. Yet in all that time the contractor made no request for a change in the specifications. And no appeal was taken from the decision of the contracting officer. If a request for change of specifications had been made and denied, an appeal could then have been taken to the head of the department (see pp. 7–8, *supra*). Having thus elected to proceed without obtaining orders in the manner provided by the contract, the contractor was properly denied recovery. *Plumley* v. *United States,* 226 U. S. 545, 547; *United States* v. *McShain,* 308 U. S. 512, 520; *Hawkins* v. *United States,* 96 U. S. 689, 697; *Wisconsin Bridge & Iron Co.* v. *United States,* 97 C. Cls. 165;

[4] In *Armstrong and Co.* v. *United States*, 98 C. Cls. 519, upon which petitioner particularly relies (Pet. 16–18), the Court of Claims, with Chief Justice Whaley and Judge Whitaker dissenting and Judge Jones concurring in result only, allowed recovery although no order had been given in writing for the additional expense to which the contractor had been put as a consequence of the substitution by the Government agent of inferior bricks for those which the contractor planned to use. The Court considered this an "Extras" case under Article 5 of the standard Government contract (see p. 13, *infra*), and held the case not governed by Article 3.

Arnold M. Diamond v. *United States,* 98 C. Cls. 428; *Ferris* v. *United States,* 28 C. Cls. 332.

3. In any event, the conclusion below may be supported on a third ground. By accepting without protest the check tendered in full settlement of the Government's liability under the contract, the contractor barred itself and all persons claiming under or through it from making any claims against the Government based upon the work performed in connection with such contract. *Poole Engineering Co.* v. *United States,* 57 C. Cls. 232; *Joice* v. *United States,* 51 C. Cls. 439.[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
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DAVID L. KREEGER,
Special Assistant to the Attorney General.
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Attorneys.

FEBRUARY 1945.

[5] Petitioner urges (Pet. 18–25) that in any event it is entitled to recover on a *quantum meruit* basis. Since the work upon which the claim is based was performed under an express contract, this doctrine is inapplicable. *Hawkins* v. *United States,* 96 U. S. 689, 697; *Pharr* v. *United States,* 62 C. Cls. 445; *Hampton* v. *United States,* 82 C. Cls. 162; cf. *Klebe* v. *United States,* 263 U. S. 188.

APPENDIX

Contract

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment, the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indi-

cated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

* * * * *

ARTICLE 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this

contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Specifications

6. INTERPRETATIONS.—The decision of the contracting officer, or his authorized representative, as to the proper interpretation of the drawings and specification, shall be final. The supervising architect is the duly authorized representative of the contracting officer.

* * * * *

13. EXAMINATION OF ROUTE.—Bidders should fully inform themselves regarding the conditions to be met along the route on which the work will be done, and in the buildings to be served by the system. Failure to take this precaution will not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government.

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25. Everything necessary for the completion and successful operation of the work, whether or not herein definitely specified or indicated on the drawings, shall be furnished and installed as well and as faithfully as if so specified or so indicated.

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67. RISKS OF THE WORK.—The contractor shall carry on the work at his own risk until it is fully

completed and is accepted by the Government. The Government will vacate the premises to which it holds title during the life of the contract hereunder. The contractor shall be responsible for the proper care and protection of the premises, and for all damage to persons or property that occurs as a result of his fault or negligence.

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104. BRACING AND SHEETING.—The sides of excavations shall be temporarily supported and maintained secure until permanent support is provided. But wherever the removal of temporary sheeting would permit a settlement of the adjacent soil, with the possibility of affecting the stability of existing structures, then the contractor, instead of installing temporary sheeting, shall install sheet steel piling which shall be left in place in the ground, or he shall underpin the existing foundations with masonry. For example, sheet steel piling will be required at 18th and D Streets and at the Munitions Building, and elsewhere if it be so directed or necessary to maintain the safety of the work and the adjoining property.

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110. PLACING.—Earth backfill shall be placed in horizontal layers, not over 8 inches in depth, each thoroughly tamped, packed, or puddled, as directed, so that no settlement shall occur. All temporary planking, timbering, sheeting, and other supports shall be removed as the backfill is placed. Great care shall be exercised during the backfilling to avoid disturbance or damage to any concrete or other work.

U. S. GOVERNMENT PRINTING OFFICE: 1945